No. 676

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANKLIN EDWARD KAMENY, *Petitioner*

v.

WILBER M. BRUCKER, SECRETARY OF THE ARMY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The District Court for the District of Columbia did not enter an opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-3a) is reported at 282 F. 2d 823. The order of the Court of Appeals denying the petition for rehearing (Pet. App. 4a) was entered without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1960. The order of the Court of Appeals denying the petition for rehearing was entered on August 31, 1960. On November 18, 1960, the Chief Justice extended the time for filing the petition for a writ of certiorari to and including January 28, 1961. The petition for a writ of certiorari was filed on January 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the applicable procedural safeguards were observed where the Department of the Army removed petitioner from his position as a temporary employee and the Civil Service Commission disqualified him from a competitive position for three years.

REGULATIONS INVOLVED

The pertinent Civil Service regulations are set forth in the petition, pp. 3-5.

STATEMENT

Petitioner filed suit in the District Court seeking reinstatement to his position as an astronomer with the Army Map Service and declaratory relief from an order of the Civil Service Commission disqualifying petitioner from an appointment in the competitive federal service for a period of three years (J.A. 2-6).[1] The District Court granted respondents'[2] motion for

[1] "J.A." refers to the joint appendix filed in the court below.

[2] Petitioner named as defendants, in addition to Secretary of the Army Brucker, the three Civil Service Commissioners.

summary judgment, and, on appeal, the Court of Appeals affirmed. The pertinent facts are as follows:

1. On July 15, 1957, petitioner received a temporary appointment as an astronomer, grade GS-9, in the Army Map Service of the Department of the Army (Def. Exhibit 11 To Motion for Summary Judgment). Less than six months later, on December 10, 1957, pursuant to an agency investigation, petitioner was advised that the appointing authority proposed to remove him on December 20, 1957 (J.A. 7). The basis for removal given in the letter to petitioner was that he had falsified "official government documents in connection with [his] employment at the Army Map Service" (J.A. 7).

In support of this charge, the letter proposing removal stated that petitioner had "failed to furnish a completely truthful answer" to a question on his Form 57 applicable for employment, which petitioner had filled out on June 23, 1957[3] (J.A. 7-8). In reply to a question on that form asking about the nature of prior arrests, including the charge and action taken (J.A. 15), petitioner had answered that he had been arrested in August 1956 in San Francisco and charged with disorderly conduct, and that he had been found not guilty and the charge dismissed (J.A. 15-16). In actuality, however, as noted in the letter proposing removal, petitioner had been arrested by Inspectors of the Sex Detail in San Francisco, charged with "Viola-

[3] Petitioner was informed on the Form 57 that the information he gave thereon would be subject to investigation, and that, in determining his fitness for employment, a "false statement or dishonest answer" to any question would be taken into account and might even constitute grounds for dismissal (J.A. 16).

tion of Section 215 Police Code (Lewd and Indecent Acts)," pleaded guilty, paid a fine, and been put on probation for six months (J.A. 7-8, 17-18).[4]

The letter proposing removal further advised petitioner of his right to answer the notice of proposed adverse action personally and in writing, and to submit any and all evidence he might deem necessary within three days from receipt of the notice (J.A. 8). He was also informed that all regulations and records that he might require would be available to him in the Civilian Personnel Office and that he would be continued on work status during the advance notice period (J.A. 8).

In a letter dated December 11, 1957, petitioner replied to the charge, asserting that to the best of his knowledge and belief the statements on his Form 57 were true (J.A. 10-12). By letter dated December 20, 1957, the Civilian Personnel Officer, acting for the Commander, advised petitioner that, after careful consideration of the charge specified in the letter of proposed removal, and of petitioner's reply, it had been decided to sustain the charge, and petitioner's removal would be effective as of December 20 (J.A. 12-13). Petitioner was informed that he had a right to appeal the decision, through the grievance procedure outlined in Civilian Personnel Regulation E-2,[5] within ten work

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[4] Petitioner successfully complied with the conditions of this probation, and, pursuant to California law, his plea of guilty was then set aside, a plea of not guilty entered, and the case dismissed (J.A. 9).

[5] This regulation of the Department of the Army provided in pertinent part:

> Complaints or grievances arising from the following types of decisions or actions will be processed under these regula-

days from the date of the letter (J.A. 12-13). Attached to the letter of removal was a Department of the Army Notification of Personnel Action stating that the removal was based on the "falsification of * * * documents in connection with * * * employment * * *" (J.A. 12-13).

On December 23, 1957, petitioner appeared before Commanding Colonel F. O. Diereks and the Civilian Personnel Officer and presented an oral statement explaining his failure to list more complete information on his Form 57 (Def. Exhibit 8 to the Motion for Summary Judgment). After listening to his explanation, Colonel Diereks stated that he desired to have the information presented in writing for his personal review (*ibid.*). On January 14, 1958, petitioner submitted a lengthy memorandum, in compliance with the request, and also filed three character affidavits, a biographical statement, and, later, a statement from his psychiatrist (Def. Exhibits 7 and 7a to the Motion for Summary Judgment).

By letter dated March 12, 1958, Colonel Diereks advised petitioner that he had failed to show that he was unaware of the exact nature of the charge and action taken in connection with his arrest in San Francisco. As a result, and "after careful review" of the entire

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tions with authority for final action vested in the commanding officer. Hearings may be held at the commanding officer's discretion, but the employee concerned will not be entitled to request a review, except as provided * * * below.

(1) Separations, initiated by the appointing officer, of employees serving probationary or trial periods, who fail to demonstrate their qualifications for the job, or who manifest attributes which indicate unsuitability for Federal employment, or who fail to meet minimum eligibility standards for appointment * * *

matter concerning the falsification on the Form 57, the removal action was upheld (J.A. 15).

2. Prior to the agency letter proposing removal, the Civil Service Commission, pursuant to its regulations concerning temporary appointments such as petitioner's, had commenced an investigation into petitioner's suitability and fitness for service. On November 26, 1957, during the course of an interview by a Commission investigator, petitioner was asked questions with respect to the San Francisco arrest and also with respect to certain information brought to the Commission's attention that petitioner was a homosexual (J.A. 22-24). While answering certain questions in part, petitioner generally declined to offer any comments on the questions concerning his alleged homosexuality (J.A. 22-24). He later submitted a brief statement to the Commission that he had never done anything immoral and that he should be retained in his position for the good of the government (J.A. 29-30). On December 25, 1957, in another interview with a Commission investigator, petitioner was invited to submit additional evidence or statements on his own behalf, but he declined to discuss the matter raised in the first interview (J.A. 26-29).

On January 15, 1958, petitioner received a letter from the Chief of the Investigations Division of the Civil Service Commission, in which he was informed that, based on the entire investigation, the statements he had made, and his general refusal to discuss other questions, the Commission had concluded that petitioner was "disqualified for employment in the competitive Federal service under the provisions of Section 2.106 of the Civil Service Regulations because of

immoral conduct" (J.A. 34-35). The letter also advised petitioner that he was "barred from competing in examinations for or accepting appointments to positions in the competitive Federal service for a period of three years" (*ibid.*). Finally, the letter pointed out petitioner's right to appeal.

On February 14, 1958, petitioner filed a lengthy statement of appeal with the Civil Service Commission (Def. Exhibit 15 to the Motion for Summary Judgment). On March 17, 1958, the Chairman of the Board of Appeals and Review informed petitioner by letter that the action of the Investigations Division was affirmed (J.A. 33-34). The Board had concluded that, after weighing all the statements and evidence, the action of disqualification was warranted under the immoral conduct standard of unsuitability, as provided in 5 C.F.R. 2.106(3). Thereafter, petitioner prosecuted one final administrative appeal to the Chairman of the Civil Service Commission, who, by letter of May 15, 1958, advised him that, after consideration of the record, the Commissioners had found no reason to reopen the matter, and that the decision of the Board of Appeals and Review constituted the final decision of the Commission (J.A. 32).

After unsuccessfully seeking reinstatement and declaratory relief in the District Court, which granted the respondents' motion for summary judgment without opinion, petitioner appealed to the court below. That court affirmed, *per curiam*, holding that petitioner had been given all the procedural protections to which he was entitled as a temporary appointee (Pet. App. 2a-3a). Having so ruled, the court declined to go into the merits of the conclusions reached in effec-

tuating petitioner's removal and disqualification (Pet. App. 3a).

ARGUMENT

1. As a temporary appointee subject to investigation as to qualification and fitness for federal service, petitioner was accorded, in both the removal and disqualification actions, the full procedural protections provided by the applicable regulations. The removal action initiated by the Army, well within the period provided for investigation, was based on the charge of falsification of petitioner's employment application. Petitioner had been allowed to reply to the charge fully, and to appear at a special hearing.[6] The disqualification from competitive federal service for three years by the Civil Service Commission, as a result of its conclusion of immoral conduct in petitioner's case, similarly was accomplished in complete accord with the Commission's own regulations for employees of petitioner's status. As a temporary employee, whose qualifications had to be determined after commencement of what constituted a conditional appointment, petitioner cannot point to any violation of the applicable procedural standards. Cf. *Kirkpatrick* v. *Gray*, 198 F. 2d 533 (C.A. D.C.), certiorari denied, 344 U.S. 880; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A. D.C.), certiorari denied, 346 U.S. 937.

2. Petitioner does not seriously contend that there has been any lack of procedural regularity in effecting

[6] As the court below noted, no hearing was required in the case of a temporary employee (Pet. App. 2a). See Civilian Personnel Regulation E-2, fn. 5, *supra*, pp. 4-5, 5 C.F.R. 9.104 (Pet. 5) provides that "[a]n employee serving under a temporary appointment may be separated at any time upon notice in writing from the appointing officer."

his removal and disqualification but relies essentially on a challenge to the reasons or justification behind the actions taken in his case. The short answer here, of course, as noted by the court below, is that the courts do not go beyond the question of substantial procedural compliance in employee discharge cases but leave the substantive basis for removal to the discretion of the employing agency. *E.g., Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A. D.C.), certiorari denied, 353 U.S. 970; *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A. D.C.); *Keyton* v. *Anderson*, 229 F. 2d 519 (C.A. D.C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C.A. D.C.), certiorari denied, 348 U.S. 819.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[7]

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[7] The petition, which extends to 60 pages, should also be denied because of its plain violation of the requirement of brevity in Rule 23(4) of the Rules of this Court.

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